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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 MARK F SPANGLER,

10 Petitioner,

11 v.

12 UNITED STATES OF AMERICA,

13 Respondent.

CASE NO. C16-1923 RSM

ORDER DENYING PETITIONER'S  
MOTION UNDER 28 U.S.C. § 2255

14 **I. INTRODUCTION**

15 Before the Court is Petitioner's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or  
16 Correct Sentence. Dkt. #1. Petitioner Mark F. Spangler challenges the 192-month sentence  
17 imposed on him by this Court following his jury-trial conviction for twenty-four counts of wire  
18 fraud, seven counts of money laundering, and one count of investment advisor fraud. *Id.* at 1;  
19 Case No. 2:12-CR-00133-RSM, Dkt. #165. Petitioner challenges his sentence on twenty-two  
20 grounds. Dkt. #1. The Government responds that Mr. Spangler's Motion should be denied  
21 because his claims are procedurally barred and because they are based on false premises. Dkt.  
22 #7. After full consideration of the record, and for the reasons set forth below, the Court  
23 DENIES Mr. Spangler's § 2255 Motion.  
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## II. BACKGROUND

Petitioner Mark Spangler was a registered investment advisor with the Securities and Exchange Commission. ER 227, 418-19, 1862; SER 366 (example of annual registration forms introduced at trial).<sup>1</sup> He headed an investment firm called the Spangler Group. ER 227; SER 364. The Spangler Group had approximately 25 client families. SER 271. Mr. Spangler was eventually found guilty of operating an investment fraud scheme where he diverted client money to two startup companies under his control and used new investments to cash out or pay dividends to existing clients.

The scheme collapsed when several clients began to raise questions and to ask to redeem their investments. Unable to cover these redemption requests, Mr. Spangler placed his business into state-court receivership in June 2011 and asked Kent Johnson to serve as the court-appointed receiver. ER 354, 477, 495; *see In re Receivership of the Spangler Group, Inc.* (King County Case No. 11-2-22214-4 SEA). Under the court's supervision, Johnson managed claims submitted by Mr. Spangler's clients and by Mr. Spangler himself. Johnson was able to recover close to 30 million dollars, or approximately half of what the clients had invested with Spangler. ER 486-87.

On cross-examination, Johnson explained that he had met with defense counsel to discuss the distribution of funds to the investors. ER 494. Defense counsel admitted into evidence through Johnson a copy of a spreadsheet that showed the differences between three different distribution methodologies that he referred to as "pooled cash," "specific capital," and "specific cash." *See* Def. Trial Exh. A-6; ER 508-509. Johnson explained that the U.S.

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<sup>1</sup> The Court's citations to "ER" and "SER" are from the excerpts of record and supplemental excerpts of record, respectively, filed in the Ninth Circuit appeal of the underlying criminal case. *See* Ninth Circuit Case No. 14-30042, Dkts. #20 and #28.

1 Attorney's Office disagreed with the use of the "specific cash" distribution methodology. ER  
2 511. He testified that the receivership came up with the "pooled cash" methodology as the  
3 methodology that would "be the most fair for most of the investors . . . and at the same time  
4 create the least objection..." ER 512. Johnson described presentations given to the investors  
5 on the proposed distributions at the courthouse and at the Seattle Public Library. ER 512.  
6 Johnson explained that government lawyers attended the presentation given at the courthouse.  
7 ER 513. On redirect examination, Johnson explained that the state court approved Johnson's  
8 recommendation that the "pooled cash" methodology be used to distribute assets to the  
9 investors. ER 518.

10 On November 7, 2013, after a jury trial, Petitioner was convicted of twenty four counts  
11 of wire fraud, seven counts of money laundering, and one count of investment advisor fraud.  
12 Case No. 2:12-CR-00133-RSM, Dkt. #143. On March 13, 2014, Petitioner was sentenced to  
13 192 months in prison. Case No. 2:12-CR-00133-RSM, Dkt. #165. Petitioner filed his current  
14 § 2255 Motion on December 16, 2016. Dkt. #1. Petitioner's Motion alleges 22 grounds for  
15 relief, including, *e.g.*, "[t]he prosecutor's failure to reveal a scheme to get State Court approval  
16 of a 'pooling' distribution plan prior to trial.... Put simply, this scheme had Petitioner's guilt  
17 definitively decided by a State Court Motion months before his actual trial began, and no one  
18 questioned its veracity." Dkt. #1 at 4. All 22 grounds relate to this alleged scheme related to  
19 the pooling distribution plan established in the state court receivership proceeding.

### 20 III. DISCUSSION

#### 21 A. Legal Standard

22 A motion under 28 U.S.C. § 2255 permits a federal prisoner in custody to collaterally  
23 challenge his sentence on the grounds that it was imposed in violation of the Constitution or  
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1 laws of the United States, or that the Court lacked jurisdiction to impose the sentence or that the  
2 sentence exceeded the maximum authorized by law. A petitioner seeking relief under § 2255  
3 must file his motion with the one-year statute of limitations set forth in § 2255(f).

#### 4 **B. Procedural Bar to Mr. Spangler’s § 2255 Petition**

5 A claim may not be raised in a Section 2255 motion if the defendant had a full  
6 opportunity to be heard on the claim during the trial phase and on direct appeal. *See Massaro*  
7 *v. United States*, 123 S. Ct. 1690, 1693 (2003). Where a defendant fails to raise an issue before  
8 the trial court, or presents the claim but then abandons it, and fails to include it on direct appeal,  
9 the issue is deemed “defaulted” and may not be raised under Section 2255 except under  
10 unusual circumstances. *Bousley v. United States*, 523 U.S. 614, 622 (1998); *see also United*  
11 *States v. Braswell*, 501 F.3d 1147, 1149 & n.1 (9th Cir. 2007). Unless the petitioner can  
12 overcome this procedural default, the Court cannot reach the merits of his claims. *See Bousley*,  
13 523 U.S. at 622. To do so, the petitioner must “show both (1) ‘cause’ excusing his double  
14 procedural default, and (2) ‘actual prejudice’ resulting from the errors of which he complains.”  
15 *United States v. Frady*, 456 U.S. 152, 168 (1982).<sup>2</sup> To demonstrate “cause” for procedural  
16 default, a defendant generally must show that “some objective factor external to the defense”  
17 impeded his adherence to a procedural rule. *Murray*, 477 U.S. at 488. *See also United States v.*  
18 *Skurdal*, 341 F.3d 921, 925 (9th Cir. 2003). The Supreme Court has held that “cause” for  
19 failure to raise an issue exists “where a constitutional claim is so novel that its legal basis is not  
20 reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984). The “prejudice” prong  
21 of the test requires demonstrating “not merely that the errors at . . . trial created a possibility of  
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24 <sup>2</sup> Another means by which procedural default may be excused is by establishing actual innocence. *See Bousley*,  
523 U.S. at 622. Mr. Spangler does not assert actual innocence in his Motion.

1 prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire  
2 trial with error of constitutional dimensions.” *Frady*, 456 at 170.

3         According to the Government, Mr. Spangler concedes that all 22 grounds raised in his  
4 motion were not raised in direct appeal, *see* Dkt. #1 at 5-38 (responses to Question (b)(1)), but  
5 fails to adequately explain why these claims are not barred procedurally. The form used by Mr.  
6 Spangler for his Motion prompts the filer to supply this information. For Grounds 1-14 and 16-  
7 20, Mr. Spangler’s Motion states only “Prosecutor’s failure to reveal and correct (BRADY,  
8 NAPUE) Cause and prejudice for every grounds [sic] except 15, 21, and 22.” *See, e.g.*, Dkt. #1  
9 at 5. For Grounds 15 and 21, Mr. Spangler states only “[n]ot material until prosecutor’s  
10 scheme uncovered.” *Id.* at 26 and 35. For Ground 22, Mr. Spangler states nothing. The  
11 Government argues that this is insufficient to establish “cause” because there was no “hidden  
12 government scheme to coerce the state-court receiver to use a pooled-cash methodology” and  
13 because “information regarding the receiver’s proposed distribution methodology was available  
14 at trial.” Dkt. #7 at 24 n.3. Mr. Spangler has also failed to establish “prejudice,” according to  
15 the Government, because “Mr. Spangler fails to explain how any of the 22 grounds ‘infect[ed]  
16 his entire trial with error of constitutional dimensions,’ particularly when the evidence at trial  
17 overwhelmingly demonstrated his guilt.” *Id.* at 24 (citing *Frady*, 456 U.S. at 170).

18         In Reply, Mr. Spangler submits over 150 pages in briefing and over 250 pages of  
19 exhibits. *See* Dkts. #8 and #9. Writing without page limits or attempt at brevity, Mr. Spangler  
20 does not get around to replying to the Government’s arguments above. Instead, Mr. Spangler  
21 argues the merits of his petition only. The only mention of cause and prejudice occurs in the  
22 following paragraph:

23                     CAUSE AND PREJUDICE  
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1           Petitioner's cause and prejudice is [sic] based on the State's  
2           violations of *Brady v. Maryland* 373 US [sic]. A Brady violation  
3           has three components, and the second and third components  
4           parallel the good cause and prejudice needed to overcome the  
5           procedural bars for all Grounds, except Grounds Fifteen and  
6           Twenty One.

7           *Id.* at 2. Mr. Spangler offers no further explanation to excuse his double procedural default.

8           As an initial matter, the Court finds that Mr. Spangler failed to put forth in his initial  
9           Motion any substantive argument for "cause" excusing his procedural default or "actual  
10          prejudice" resulting from the errors of which he complains. Mr. Spangler cannot simply state  
11          the magic words "cause and prejudice" in his Motion and provide the Government an adequate  
12          opportunity to respond.<sup>3</sup> On this basis alone the Court can deny Mr. Spangler's Motion.  
13          However, the Court has also reviewed Mr. Spangler's Reply brief and found insufficient cause  
14          for Mr. Spangler's failure to raise these issues on direct appeal. Again, Mr. Spangler appears to  
15          state only the magic words "cause and prejudice" without further support. The Court agrees  
16          with the Government that information regarding the receiver's proposed distribution  
17          methodology was available at trial and prior to appeal, and that Mr. Spangler is procedurally  
18          barred from raising these issues for the first time now. Accordingly, the Court finds that Mr.  
19          Spangler has failed to overcome the procedural bar for all of his claims and they are properly  
20          dismissed on that ground alone. *See Bousley*, 523 U.S. at 622.

### 21           **C. Certificate of Appealability**

22           A petitioner seeking post-conviction relief under § 2255 may appeal this Court's  
23          dismissal of his petition only after obtaining a Certificate of Appealability ("COA") from a  
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<sup>3</sup> Furthermore, it is well established that the Court need not address an argument raised for the first time on reply. *See United States v. Berry*, 624 F.3d 1031, 1039 n.7 (9th Cir. 2010) (declining to address an argument raised for the first time in a reply brief in a § 2255 motion); *Belgarde v. Montana*, 123 F.3d 1210, 1216 (9th Cir. 1997) (declining to consider claims not raised in the original habeas petition to the district court).

1 district or circuit judge. The Court finds that a COA is not warranted in this case. A COA may  
2 issue only where a petitioner has made “a substantial showing of the denial of a constitutional  
3 right.” *See* 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard “by demonstrating that  
4 jurists of reason could disagree with the district court’s resolution of [her] constitutional claims  
5 or that jurists could conclude the issues presented are adequate to deserve encouragement to  
6 proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931  
7 (2003). As discussed above, the law regarding procedural default is clear in the Ninth Circuit.  
8 Therefore, the Court finds no basis to issue a COA.

#### 9 **IV. CONCLUSION**

10 Having considered Petitioner’s motion, Respondent’s answer thereto, and the remainder  
11 of the record, the Court hereby finds and ORDERS:

- 12 1. Petitioner’s Motion under § 2255 (Dkt. #1) is DENIED. No COA shall be issued.
- 13 2. This matter is now CLOSED.
- 14 3. The Clerk of the Court is directed to forward a copy of this Order to Petitioner and  
15 all counsel of record.

16  
17 DATED this 24<sup>th</sup> day of May 2017.

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20 RICARDO S. MARTINEZ  
21 CHIEF UNITED STATES DISTRICT JUDGE  
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